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Supreme Court, U.S.
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No. 10-735

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC., ET AL.,
Petitioners,

v.

DEANIA M. JACKSON,
ON BEHALF OF HERSELF AND ALL OTHER PERSONS SIMILARLY SITUATED,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Fourth Circuit Court of Appeal

RESPONDENT'S REPLY TO SUPPLEMENTAL BRIEF OF PETITIONERS

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RESPONDENTS' REPLY TO SUPPLEMENTAL BRIEF OF PETITIONERS

Philip Morris's supplemental brief in support of its Petition for a Writ of Certiorari treats the instant case as if it were a hypothetical one that merely applied, in Louisiana, the flawed rulings of the Ninth Circuit that this Court identified in *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277, slip op. (U.S. June 20, 2011). The characterization is as inaccurate as it is fanciful, for the Louisiana courts followed a wholly different analysis, applied wholly different state law, and provided Philip Morris with extensive interlocutory appellate review throughout the 14 years this case was in litigation in Louisiana. *See* Br. in Opp. 1-6.

Moreover, contrary to Philip Morris's claim that this case is prototypical of a vast number of state class actions that lack the types of protections inherent in the federal rules, the Louisiana courts accorded great care in protecting Philip Morris's interests and repeatedly acknowledged that this matter was "unique." *See, e.g.*, Pet. App. 20a (quoting Pet. App. 265a). Because of the vast differences in the law applied by the courts below, the underlying common issues of fact and law that led to certification *in 1997*, and the non-monetary relief sought and awarded, this case does not present a certworthy issue to the court, nor does it deserve further delay in instituting the smoking-cessation services ordered below through an order to grant, vacate and remand to an intermediate Louisiana court for further rounds of reviews.

In the last week, this Court has now twice rejected entreaties similar to that of Philip Morris to

treat the requirements of Federal Rule of Civil Procedure 23 as though they are requirements of state courts. In *Smith v. Bayer Corp.*, No. 09-1205, slip op. (U.S. June 16, 2011), this Court recognized that even identically worded state rules are not necessarily coterminous, particularly where the state courts have articulated a different approach. *Id.* at 8-12. And, in *Wal-Mart*, despite briefing and argument on due-process requirements, this Court restricted its ruling to the applicability of federal Rule 23. This Court should again reject the invitation to conflate Rule 23 with Due Process.

Indeed, this Court has repeatedly rejected the claim that Rule 23 is the only method compatible with Due Process to prosecute a class action. In asking that this Court use this case as a vehicle for more assiduously enforcing Rule 23 as if it were constitutionally mandated and thus equally applicable to the States, Philip Morris ignores this Court's consistent holdings that the Due Process Clause does not "compel the [States'] adoption of the particular rules thought by this court to be appropriate for the federal courts." *Hansberry v. Lee*, 311 U.S. 32, 42 (1940). Even the case Philip Morris cites for the proposition that Rule 23 is based on a constitutional foundation, Pet'rs' Supp. Br. 3, announces that "fidelity to the Rules Enabling Act," *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 629 (1997), is not a requirement of state class actions. Instead, states remain "free to develop their own rules for protecting against . . . the piecemeal resolution of disputes," and only overstep this authority when they adopt "extreme applications" "inconsistent with a federal right that is 'fundamental in character.'" *Richards v. Jefferson County*, 517 U.S. 793, 797 (1996). No such

fundamental federal right has been asserted by Philip Morris.

Philip Morris attempts to find some comfort in this Court's statement in *Wal-Mart* that suggests a due-process connection to its back-pay ruling. Pet'rs' Supp. Br. 2. Even here, however, Philip Morris takes this Court's language out of the limited context in which it made the statement. In noting that notice and opt-out are due-process requirements, the *Wal-Mart* opinion plainly states that this is so "[i]n the context of a class action predominantly for money damages." Slip op. at 23. Of course, notice and an opportunity to opt-out were provided to the Plaintiffs here. Yet, this case is not a claim for money damages, but for smoking-cessation services, administered by the court.

Because of the nature of the relief ordered, establishment of a court-administered smoking-cessation program, rather than monetary relief of the type at issue in *Wal-Mart*, *see* Pet. App. 28a, there is no application of this Court's analysis of the availability of Rule 23(b)(2) certification for monetary damages, either as a matter of the federal rules or as a matter of federal due process.

Finally, as observed by the court below:

> The ten-year remedy fashioned by the jury, and later approved by this court, has not yet begun. Not a single habitual smoker has yet benefitted from the program. The beneficiaries are aging. Dr. Naseta, whom the tobacco companies called as an expert witness at the jury trial, testified that every

> smoker should stop smoking and every habitual smoker would benefit from the cessation program. Further delay in rendering judgment will unnecessarily and, more importantly, unfairly impair the possibilities of aging smokers to cease their habits and to surely improve their own lives, not to mention the lives of their family members and co-workers.

Pet. App. 19a.

Further delay in implementing a program found necessary to save thousands of lives from the ravages of smoking addiction is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Date: June 21, 2011

Respectfully submitted,

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